WINDELS MARX LANE & MITTENDORF, LLP *Attorneys for Alan Nisselson, Ch. 7 Trustee* 156 West 56th Street New York, New York 10019 Tel. (212) 237-1000 / Fax. (212) 262-1215 Attorneys Appearing: Howard L. Simon (hsimon@windelsmarx.com) Edmund B. Troya (etroya@windelsmarx.com)	Hearing Date: November 2, 2017 @ 10:00 a.m. Objections Due: October 26, 2017 @ 5:00 p.m.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re NARCO FREEDOM, INC., Debtor.	Chapter 7 Case No. 16-10123-smb
ALAN NISSELSON, as Chapter 7 Trustee of NARCO FREEDOM, INC., Plaintiff, -against- MATRIX TRUST COMPANY, PENSERV PLAN SERVICES, INC., JASON BRAND, JOHN CORNACHIO, RICHARD GROSS, ANDREA CORNACHIO, ALAN BRAND, and JONATHAN BRAND, Defendants.	Adv. Proc. No. 16-01088-smb

NOTICE OF TRUSTEE'S MOTION FOR APPROVAL OF THE SETTLEMENT STIPULATIONS BETWEEN THE TRUSTEE AND: (A) JASON BRAND, JONATHAN BRAND AND ALAN BRAND; (B) THE STATE OF NEW YORK, RICHARD GROSS AND GERALD BETHEA; AND (C) JOHN CORNACHIO AND ANDREA CORNACHIO

PLEASE TAKE NOTICE that Alan Nisselson (the "**Trustee**"), as trustee for the Chapter 7 estate (the "**Estate**") of Narco Freedom, Inc. (the "**Debtor**"), by and through his undersigned counsel, will move before The Honorable Stuart M. Bernstein, United States Bankruptcy Judge, at the United States Bankruptcy Court, the Alexander Hamilton Customs House, One Bowling Green, Courtroom 723, New York, New York 10004, on **November 2, 2017 at 10:00 a.m. (the "Hearing")**, or a soon thereafter as counsel can be heard, for approval pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") of three settlement stipulations by and among the Trustee and the following parties: (1) Jason Brand, Jonathan Brand and Alan Brand; (2) the State of New York, Richard Gross and Gerald Bethea; and (3) John Cornachio and Andrea Cornachio, as more particularly set forth in each of the settlement stipulations (the "**Settlement Stipulations**") annexed to the Trustee's motion (the "**Motion**").

PLEASE TAKE FURTHER NOTICE that the Motion and all papers filed therewith (the "**Motion Papers**") are available for viewing on the Court's official website: www.nysb.uscourts.gov (the "**Court's Website**") or, upon request, from the undersigned. Please note that a Pacer password is required to view documents on the Court's Website.

PLEASE TAKE FURTHER NOTICE that, if you do not want the court to approve the Settlement Stipulations, or if you want the court to consider your views on the Motion, then, on or before **October 26, 2017 at 5:00 p.m. (the "Objection Deadline")**, you or your attorney must file with the court a response or objection to the Motion. That response or objection must be in writing; shall conform to the Bankruptcy Rules and other applicable rules and orders of this Court; shall be filed in accordance with General Order M-399 and the electronic filing procedures for the United State Bankruptcy Court for the Southern District of New York, which can be found at the Court's Website, with a courtesy copy delivered to the Chambers of the Honorable Stuart M. Bernstein; and shall be served upon the following parties so as to be received no later than the Objection Deadline: (i) the undersigned attorneys for the Trustee; and (ii) the Office of the United States Trustee for the Southern District of New York, 201 Varick Street, Suite 1006, New York, New York 10014, Attn: Brian Masumoto, Esq., Linda Riffkin, Esq., and Susan Arbeit, Esq. You or your attorney must also attend the Hearing, either in person, or telephonically with the Court's permission **If you or your attorney do not take these steps, the Court may decide that you do not oppose the relief sought in the Motion and may enter an order granting that relief.**

Dated: New York, New York
September 27, 2017

WINDELS MARX LANE & MITTENDORF, LLP
Attorneys for Alan Nisselson, Chapter 7 Trustee

By: */s/ Howard L. Simon*

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ALAN NISSELSON, as Chapter 7 Trustee of NARCO FREEDOM, INC., Plaintiff, -against- MATRIX TRUST COMPANY, PENSERV PLAN SERVICES, INC., JASON BRAND, JOHN CORNACHIO, RICHARD GROSS, ANDREA CORNACHIO, ALAN BRAND, and JONATHAN BRAND, Defendants.	Adv. Proc. No. 16-01088-smb

TRUSTEE'S MOTION FOR APPROVAL OF THE SETTLEMENT STIPULATIONS BETWEEN THE TRUSTEE AND: (A) JASON BRAND, JONATHAN BRAND AND ALAN BRAND; (B) THE STATE OF NEW YORK, RICHARD GROSS AND GERALD BETHEA; AND (C) JOHN CORNACHIO AND ANDREA CORNACHIO

TO THE HONORABLE STUART M. BERNSTEIN,
UNITED STATES BANKRUPTCY JDUGE

Alan Nisselson, as Chapter 7 Trustee (the "**Trustee**") of Narco Freedom, Inc. ("the "**Debtor**," or "**Narco Freedom**"), submits this motion pursuant to Rule 9019 of the Federal Rules of Bankruptcy Procedure (the "**Bankruptcy Rules**") and respectfully represents:

RELIEF REQUESTED

1. The Trustee seeks approval of the attached settlement stipulations between the Trustee and the following parties: (A) Jason Brand, Jonathan Brand and Alan Brand (the "**Brand Stipulation**", attached hereto as "**Exhibit A**"); (B) the State of New York (the "**State**"), Richard Gross and Gerald Bethea (the "**Gross/Bethea Stipulation**", attached hereto as "**Exhibit B**"); and (C) John Cornachio and Andrea Cornachio (the "**Cornachio Stipulation**", attached hereto as "**Exhibit C**") (collectively, the "**Settlement Stipulations**").

2. By virtue of the settlements embodied in the Settlement Stipulations, 1) the above-referenced adversary proceeding by the Trustee, seeking a declaration that the assets of the Debtor's 457(b) Deferred Compensation Plan (the "**457(b) Plan**") are property of the Debtor's Estate and for turnover of the 457(b) Plan assets to the Trustee (the "**Adversary Proceeding**"), will be fully resolved; 2) claims to the funds held by the Trustee in a segregated account for executive pay as to five former executives (the "**Vacation Pay Fund**") will be fully resolved; and (3) the executives' Bankruptcy Claims No. 2, No. 83, No. 84, No. 104 and No. 119 will be extinguished.

3. The settlements embodied in the Settlement Stipulations benefit the Estate by (a) releasing to Narco Freedom's Estate some of the assets from the 457(b) Plan and the Vacation Pay Fund; (b) extinguishing the executives' Bankruptcy Claims; and (c) avoiding the need for expensive litigation that would deplete the Estate.

JURISDICTION; VENUE; GROUNDS FOR RELIEF

4. This Court has jurisdiction to consider this Motion pursuant to 28 U.S.C. §§ 151, 157 and 1334 and the *Amended Standing Order of Reference* of the United States District Court for the Southern District of New York (the "**District Court**") dated January 31, 2012 (Preska, C.J.). Venue of this case and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

The statutory prediate for the relief sought herein is Rule 9019 of the Bankruptcy Rules. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

THE DEBTOR

5. Narco Freedom, a New York not-for-profit corporation, operated as a healthcare and housing provider, providing substance abuse and behavioral health services and housing to the poor and mentally ill.

6. In October 2014, the United States commenced a civil action against Narco Freedom in the District Court under the Fraud Injunction Statute, 18 U.S.C. § 1345, alleging that Narco Freedom was violating the "Anti-Kickback Statute," 42 U.S.C. § 1320a-7b, by offering below-cost housing to residents of the Freedom Houses to induce them to enroll in Narco Freedom-run drug treatment programs. *United States of America v. Narco Freedom, Inc.*, Docket No. 14-cv-8593.[1] (AIR Doc. 1.)

7. On April 3, 2015, the District Court entered an order appointing Lori Lapin Jones as temporary receiver of the Debtor (the "**Temporary Receiver**"). (AIR Doc 147.)

8. On July 16, 2015, Judge Koeltl approved the Temporary Receiver's stabilization plan for Narco Freedom (AIR Doc. 206), and on September 11, 2015, he approved the Temporary Receiver's plan to transition all of Narco Freedom's clinics and housing to other healthcare providers. (AIR Doc. 250.)

9. On January 19, 2016 (the "**Petition Date**"), the Temporary Receiver, with the District Court's approval, filed Narco Freedom's voluntary petition for relief under chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the "**Bankruptcy Code**"). (AIR Doc. 383, Doc. 1.) Also on the Petition Date, the United States Trustee appointed Alan Nisselson as

[1] Citations to the docket of the action for injunctive relief will be identified as "AIR Doc. __."

interim trustee for the Debtor's estate. The Trustee has since qualified as permanent trustee and filed for and is covered by a bond.

10. In October 2014, the New York State Attorney General ("**NYAG**") issued an indictment charging the Debtor with the crimes of receiving bribes, fraud and money laundering, which was superseded and expanded in March 2015 (*The People of the State of New York v. Alan Brand, Jason Brand, Gerald Bethea, Richard Gross, Narco Freedom, Inc., Daso Development, Inc.*, Indictment No. 0783/2015 (Supreme Court, Bronx County)), and also issued a companion indictment in March 2015, which included a charge of grand larceny against John Cornachio (*The People of the State of New York v. Jonathan Brand and John Cornachio*, Indictment No. 0782/2015 (Supreme Court, Bronx County)) (the "**Criminal Proceeding**").

THE 457(b) PLAN ADVERSARY PROCEEDING

11. On or about June 15, 2016, the Trustee filed the 457(b) Plan Adversary proceeding against former employees of the Debtor Jason Brand, Jonathan Brand, Alan Brand, Richard Gross, John Cornachio and Andrea Cornachio, and also against Matrix Trust Company ("**Matrix**") and PenServ Plan Services, Inc. ("**PenServ**") for a declaration that the assets of the Debtor's 457(b) Plan are property of the Debtor's Estate and for turnover of the 457(b) Plan assets to the Trustee.[2] (AP Doc. 1.)

12. Matrix is the custodian for the Narco Freedom 457(b) Plan and issues statements to the Debtor showing the market value of the 457(b) Plan's portfolio.

13. PenServ provides administrative services to Narco Freedom for the 457(b) Plan, including calculating the Plan retirement account value and issuance of quarterly statements to each of the participants enrolled in the 457(b) Plan.

[2] Citations to the docket of this Adversary Proceeding will be identified as "AP Doc. __."

14. On or about July 12, 2016, Richard Gross, *pro se*, filed an answer to the complaint in the 457(b) Plan Adversary Proceeding, asserting rights to the Plan retirement account value attributable to his account under the 457(b) Plan. (AP Doc. 6.)

15. On or about July 14, 2016, Jason Brand, Alan Brand, Jonathan Brand, John Cornachio and Andrea Cornachio, by their attorneys, Pryor & Mandelup, L.L.P. ("**Pryor & Mandelup**"), filed an answer to the complaint in the 457(b) Plan Adversary Proceeding, each asserting rights to their respective retirement account value under the 457(b) Plan. (AP Doc. 5.)

16. On behalf of said defendants, Pryor & Mandelup have asserted that the funds in the 457(b) Plan are not property of the Estate, but are property of the individual employees enrolled in the 457(b) Plan.

17. The amounts attributable to the 457(b) Plan retirement account values for each of the respective former employees, according to statements issued by PenServ prior to execution of the Settlement Stipulations,[3] were as follows:

- Jason Brand: $66,766.99;
- Jonathan Brand: $61,336.28;
- Alan Brand: $26,839.10;
- Richard Gross: $111,467.95;
- John Cornachio: $62,115.37; and
- Andrea Cornachio: $59,153.71.

18. No further contributions have been made to the 457(b) Plan accounts for each of the respective former employees, and so therefore, on any given date thereafter, the retirement account value for any one of their account values would equal its March 31, 2017 balance (or the June 30,

[3] The amounts attributable to the 457(b) Plan retirement account values for Jason Brand, Jonathan Brand, Alan Brand and Richard Gross come from statements dated as of March 31, 2017, and for John Cornachio and Andrea Cornachio from statements dated as of June 30, 2017.

2017 balances in the case of the accounts of John Cornachio or Andrea Cornachio), plus or minus any investment returns and minus administrative fees allocated to said account, if any.

THE VACATION PAY FUND

19. The Vacation Pay Fund is a segregated fund that the Trustee is holding in the amount of $152,829.95, representing eight weeks of vacation pay for the following five former Narco Freedom executives: Jason Brand, Jonathan Brand, Alan Brand, Richard Gross and Gerald Bethea, plus an additional amount reflecting the Debtor's (as Employer) share of employment taxes for each executive's vacation pay amount.

20. The Vacation Pay Fund was originally set aside by the Temporary Receiver pursuant to order of Judge Koeltl, and thereafter turned over to the Trustee.

21. The amounts of the Vacation Pay Fund attributable to each of the respective former executives, less the corresponding Employer's share of employment taxes, are as follows:

- Jason Brand: $8,081.57;
- Jonathan Brand: $15,961.51;
- Alan Brand: $53,848.96;
- Richard Gross: $25,615.38; and
- Gerald Bethea: $38,461.53.

22. Each of the above former executives has asserted a right to and sought payment of their respective vacation pay amount.

THE BANKRUPTCY CLAIMS

23. Jason Brand filed Proof of Claim No. 2 in the Debtor's bankruptcy case in the amount of $178,166.85 for accrued wages, which proof of claim was originally filed as a secured and priority claim but was thereafter reclassified as a general unsecured claim. (Doc. 178.)

24. Alan Brand filed Proof of Claim No. 104 in the Debtor's bankruptcy case in the amount of $567,999.71 for contributions to an employee benefit ("accrued time (vac/sick/pers) secured by 990's under ERISA deferred ben plan"), which proof of claim was originally filed as a secured and priority claim but was thereafter reclassified as a general unsecured claim. (Doc. 177.)

25. Richard Gross filed Proofs of Claim Nos. 83 and 84 in the Debtor's bankruptcy case. Proof of Claim No. 83 was filed in the amount of $28,934.40 for "VACATION & PERSONAL TIME PAY NEVER REMITTED", which proof of claim was filed as a general unsecured claim. Proof of Claim No. 84 was filed in the amount of $110,983.25 for the "[457(b) Plan] – portion of annual salaries deffered", which proof of claim was filed as a general unsecured claim.

26. Gerald Bethea filed Proof of Claim No. 119 in the Debtor's bankruptcy case in the amount of $92,829.64 for "DEFERRED BUT EARNED PAYROLL", which proof of claim was filed as a general unsecured claim.

27. Subsequent to the filing of their respective proofs of claim, Richard Gross and Gerald Bethea entered into settlement agreements with the State with respect to the state court action filed in the Supreme Court of the State of New York for Bronx County named *Schneiderman, et al. v. Brand, et al.*, Index No. 251437/2014 (the "**State Civil Action**"). The State filed the State Civil Action to recover the proceeds of criminal conduct and civil damages against Richard Gross, Gerald Bethea and others.

28. Richard Gross and the State entered into a settlement agreement as of April 24, 2017 of the State Civil Action (the "**Gross State Settlement Agreement**"). In the Gross State Settlement Agreement, Richard Gross transferred, assigned, and relinquished to the State any

right, title or interest in (i) any and all claims Richard Gross has against the Debtor or its Estate, including but not limited to, any claims for unpaid wages or accrued vacation time, and (ii) the 457(b) Plan.

29. In addition to entering the Gross State Settlement Agreement, Richard Gross pursuant to the Agreement completed a Transfer of Claim form for the transfer of claims in the amount stated to be $140,564.43, which represented the updated aggregate amount of Claim Nos. 83 and 84, to the Medicaid Fraud Control Unit of the State's Office of the Attorney General, specifically to "NYS OAG MEDICAID FRAUD C.U." By virtue of the execution by Richard Gross of the Transfer of Claim Form, the State is the transferee of Claim Nos. 83 and 84.

30. Gerald Bethea and the State entered into a Settlement Agreement as of April 20, 2017 of the State Civil Action (the "**Bethea State Settlement Agreement**"). In the Bethea State Settlement Agreement, Gerald Bethea transferred, assigned, and relinquished to the State any right, title or interest in any and all claims Bethea has against the Debtor or its Estate, including but not limited to, any claims for unpaid wages or accrued vacation time.

31. In addition to entering the Bethea State Settlement Agreement, Gerald Bethea pursuant to said Agreement completed a Transfer of Claim form for the transfer of Claim No. 119, in the amount of $92,829.64, to the Medicaid Fraud Control Unit of the State's Office of the Attorney General, specifically to "NYS OAG MEDICAID FRAUD C.U." By virtue of the execution by Gerald Bethea of the Transfer of Claim Form, the State is the transferee regarding Claim No. 119.

32. Accordingly, the State is a party to the Gross / Bethea Stipulation.

JASON BRAND EMPLOYMENT ACTION

33. Prior to the entry of the order for relief in Debtor's chapter 7 case, Jason Brand commenced an action in the United States District Court for the Eastern District of New York,

titled *Jason Brand, et al. v. Narco Freedom, Inc., et al.*, Case No. 2:15-cv-05021-mja-grb (the "**Eastern District Action**"), asserting, *inter alia*, statutory claims against the Debtor under the Civil Rights Act of 1964 and the Americans with Disability Act of 1990 in connection with his employment by the debtor, and other employment-related claims (the "**Jason Brand Employment Claims**"), and also asserting against Debtor's insurer, CIGNA Life Insurance Company of New York ("**CIGNA**") claims arising from Debtor's ERISA disability plan (the "**CIGNA claims**").

34. Jason Brand's Employment Claims as to the Debtor are also resolved pursuant to the Brand Stipulation.

OVERVIEW OF THE SETTLEMENT STIPULATIONS

Brand Stipulation

35. The Brand Stipulation: (a) resolves the 457(b) Plan Adversary Proceeding as to Jason Brand, Jonathan Brand and Alan Brand; (b) relinquishes and assigns to the Trustee any rights of Jason Brand and Jonathan Brand to the funds held in the Vacation Pay Fund and remits to Alan Brand the amount of the Vacation Pay Fund attributable to him; and (c) disallows and expunges Jason Brand's Claim No. 2 and Alan Brand's Claim No. 104.

36. The principal terms of the Brand Stipulation as to Jason Brand are as follows: (a) he will receive a remittance equaling the final retirement account value for the 457(b) Plan account attributable to him less Applicable Withholding, and the Trustee will remit the Applicable Withholding to the appropriate taxing authorities; (b) he will relinquish and irrevocably assign to the Trustee any rights he has or may assert to the Vacation Pay Fund, and the Trustee shall be entitled without further court order to withdraw the portion of the fund attributable to him, including the corresponding Employer's share of employment taxes for the benefit of the Estate; (c) Claim No. 2 will be disallowed and expunged in its entirety, and he will not reassert such claim

or any amended, supplemental or new claim in the Debtor's bankruptcy case; (d) the automatic stay of the Eastern District Action will be modified to permit him to continue its prosecution, but only to the extent of the limits of existing insurance coverage that may be applicable to the Eastern District Action, the Trustee shall have no obligation to take part in or otherwise expend any assets of Debtor's Estate with respect to the Eastern District Action, and Jason Brand will waive any and all claims he may have against the Debtor or its insurance carriers in excess of the limits of existing insurance coverage; (e) the Trustee will acknowledge that the Front Loader (as defined in the Brand Stipulation) is not in the possession, custody or control of the Trustee or Debtor's Estate, and the Trustee and Debtor's Estate abandon any rights thereto; (f) Jason Brand will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Brand Stipulation; and (g) the Trustee will release Jason Brand on the specific terms set forth in the Brand Stipulation. In sum, Jason Brand will receive the 457(b) Plan balance attributable to him, valued at $66,766.99 as of March 31, 2017, less Applicable Withholding; and the Trustee will receive that portion of the Vacation Pay Fund attributable to Jason Brand, plus the Employer's share of employment taxes, totaling $8,699.81.

37. The principal terms of the Brand Stipulation as to Jonathan Brand are as follows: (a) he will receive a remittance equaling the final retirement account value for the 457(b) Plan account attributable to him less Applicable Withholding, and the Trustee will remit the Applicable Withholding to the appropriate taxing authorities; (b) he will relinquish and irrevocably assign to the Trustee any rights he has or may assert to the Vacation Pay Fund, and the Trustee shall be entitled without further court order to withdraw the portion of the fund attributable to him, including the corresponding Employer's share of employment taxes for the benefit of the Estate; (c) Jonathan Brand will release the Trustee and all his agents and Narco Freedom on the specific

terms set forth in the Brand Stipulation; and (g) the Trustee will release Jonathan Brand on the specific terms set forth in the Brand Stipulation. In sum, Jonathan Brand will receive the 457(b) Plan balance attributable to him, valued at $61,336.28 as of March 31, 2017, less Applicable Withholding; and the Trustee will receive that portion of the Vacation Pay Fund attributable to Jonathan Brand, plus the Employer's share of employment taxes, totaling $17,182.56.

38. The principal terms of the Brand Stipulation as to Alan Brand are as follows: (a) Matrix will release and pay to the Trustee, for the benefit of Debtor's Estate, the final retirement account value for Alan Brand; (b) Claim No. 104 will be disallowed and expunged in its entirety, and he will not reassert such claim or any amended, supplemental or new claim in the Debtor's bankruptcy case; (c) the Trustee will remit to Alan Brand an amount equal to the portion of the Vacation Pay Fund attributable to him, minus the corresponding Employer's share of employment taxes, and Alan Brand will relinquish and irrevocably assign to the Trustee any rights he has or may assert to any other portion of the Vacation Pay Fund; (d) Alan Brand will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Brand Stipulation; and (e) the Trustee will release Alan Brand on the specific terms set forth in the Brand Stipulation. In sum, Alan Brand will receive that portion of the Vacation Pay Fund attributable to him, excluding the Employer's share of employment taxes, equaling $53,848.96; and the Trustee will receive (i) the corresponding Employer's share of employment taxes from the Vacation Pay Fund attributable to Alan Brand, equaling $4,119.42; and (ii) the 457(b) Plan balance attributable to Alan Brand, valued at $26,839.10 as of March 31, 2017, including Applicable Withholding.

Gross/Bethea Stipulation

39. The Gross/Bethea Stipulation: (a) resolves the 457(b) Plan Adversary Proceeding as to Richard Gross; (b) remits to the State a portion of the Vacation Pay Fund attributable to Gerald Bethea equaling $31,000.00, and relinquishes and assigns to the Trustee any rights of

Gerald Bethea or the State to the remainder of the Vacation Pay Fund attributable to Gerald Bethea, and relinquishes and assigns to the Trustee any rights of Richard Gross or the State to the funds held in the Vacation Pay Fund attributable to Richard Gross; and (c) disallows and expunges the State's Claim Nos. 83 and 84 (assigned by Richard Gross) and the State's Claim No. 119 (assigned by Gerald Bethea).

40. The principal terms of the Gross/Bethea Stipulation with respect to Richard Gross are as follows: (a) the State will receive a remittance equaling the final retirement account value for the 457(b) Plan account attributable to Richard Gross less Applicable Withholding, and the Trustee will remit the Applicable Withholding to the appropriate taxing authorities; (b) Richard Gross and the State will relinquish and irrevocably assign to the Trustee any rights they have or may assert to the Vacation Pay Fund attributable to Richard Gross, Richard Gross will relinquish and irrevocably assign to the Trustee any rights he has or may assert to any other portion of the Vacation Pay Fund, and the Trustee shall be entitled without further court order to withdraw the portion of the fund attributable to Richard Gross, including the corresponding Employer's share of employment taxes for the benefit of the Estate; (c) Claim Nos. 83 and 84 will be disallowed and expunged in their entirety, and neither Richard Gross nor the State will reassert such claim or any amended, supplemental or new claim in the Debtor's bankruptcy case; (d) Richard Gross will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Gross/Bethea Stipulation; and (e) the Trustee will release Richard Gross on the specific terms set forth in the Gross/Bethea Stipulation. In sum, the State will receive the 457(b) Plan balance attributable to Richard Gross, valued at $111,467.95 as of March 31, 2017, less Applicable Withholding; and the Trustee will receive that portion of the Vacation Pay Fund attributable to

Richard Gross equaling $25,615.38, plus the Employer's share of employment taxes equaling $1,959.57, together totaling $27,574.95.

41. The principal terms of the Gross/Bethea Stipulation with respect to Gerald Bethea are as follows: (a) the Trustee will remit to the State a portion of the Vacation Pay Fund attributable to Gerald Bethea equaling $31,000.00 (the "**Bethea State Remittance**"), Gerald Bethea and the State will relinquish and irrevocably assign to the Trustee any rights they have or may assert to any other portion of the Vacation Pay Fund as to Gerald Bethea, Gerald Bethea will relinquish and irrevocably assign to the Trustee any rights he has or may assert to any other portion of the Vacation Pay Fund, and the Trustee shall be entitled without further court order to withdraw the portion of the fund attributable to Gerald Bethea after payment of the Bethea State Remittance, including the corresponding Employer's share of employment taxes for the benefit of the Estate; (b) Claim No. 119 will be disallowed and expunged in their entirety, and neither Gerald Bethea nor the State will reassert such claim or any amended, supplemental or new claim in the Debtor's bankruptcy case; (c) Gerald Bethea will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Gross/Bethea Stipulation; and (d) the Trustee will release Gerald Bethea on the specific terms set forth in the Gross/Bethea Stipulation. In sum, the State will receive $31,000.00 of that portion of the Vacation Pay Fund attributable to Gerald Bethea; and the Trustee will receive (i) the remaining balance of the Vacation Pay Fund attributable to Gerald Bethea after payment to the State and equaling $7,461.53, plus the corresponding Employer's share of employment taxes from the Vacation Pay Fund attributable to Gerald Bethea, equaling $2,942.29, together totaling $10,403.82.

42. In addition, the State will release the other parties to the Gross/Bethea Stipulation on the specific terms set forth therein, and the other parties to the Gross/Bethea Stipulation will release the State on the specific terms set forth therein.

Cornachio Stipulation

43. The Cornachio Stipulation resolves the 457(b) Plan Adversary Proceeding as to John Cornachio and Andrea Cornachio.

44. The principal terms of the Cornachio Stipulation as to John Cornachio are as follows: (a) John Cornachio will receive[4] a remittance equaling 70% of the final retirement account value for the 457(b) Plan account attributable to him less Applicable Withholding, and the Trustee will remit the Applicable Withholding to the appropriate taxing authorities; (b) he will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Cornachio Stipulation; and (c) the Trustee will release John Cornachio on the specific terms set forth in the Cornachio Stipulation. In sum, John Cornachio will receive 70% of the 457(b) Plan balance attributable to him, valued at $62,115.37 as of June 30, 2017, less Applicable Withholding;[5] and the Trustee will receive the 30% remainder of the 457(b) Plan balance attributable to John Cornachio.[6]

45. The principal terms of the Cornachio Stipulation as to Andrea Cornachio are as follows: (a) Andrea Cornachio will receive a remittance equaling 80% of the final retirement account value for the 457(b) Plan account attributable to her less Applicable Withholding, and the

[4] The funds for John Cornachio, less attorneys' fees, will be held in an escrow account by his counsel under the terms set forth in the Cornachio Stipulation.

[5] Using this balance as an example, the 70% settlement amount for John Cornachio (before deductions of Applicable Withholding) as of June 30, 2017 would equal $43,480.76.

[6] Again using the June 30, 2017 statement balance as an example, the Trustee would receive $18,634.61 as of that date.

Trustee will remit the Applicable Withholding to the appropriate taxing authorities; (b) she will release the Trustee and all his agents and Narco Freedom on the specific terms set forth in the Cornachio Stipulation; and (c) the Trustee will release Andrea Cornachio on the specific terms set forth in the Cornachio Stipulation. In sum, Andrea Cornachio will receive 80% of the 457(b) Plan balance attributable to him, valued at $59,153.71 as of June 30, 2017, less Applicable Withholding;[7] and the Trustee will receive the 20% remainder of the 457(b) Plan balance attributable to Andrea Cornachio.[8]

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46. Also pursuant to each of the Settlement Stipulations, each of the settling parties to the respective Stipulations will release Matrix and PenServ, except as to their obligations under each stipulation.

47. Once all aspects of the Settlement Stipulations have been performed, the Trustee will seek dismissal of the 457(b) Plan Adversary Proceeding.

LEGAL BASIS

I. THE SETTLEMENT

48. Bankruptcy Rule 9019(a) states, in pertinent part, that "[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." Courts have held that in order to approve a settlement or compromise under Bankruptcy Rule 9019(a), a court should find that the compromise proposed is fair and equitable, reasonable, and in the best interests of a debtor's estate. *Air Line Pilots Assoc., Int'l v. Am. Nat'l Bank & Trust Co. of Chicago (In re Ionosphere Clubs, Inc.*), 156 BR 414, 426 (S.D.N.Y. 1993), *aff'd*, 17 F.3d 600 (2d Cir. 1994)

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[7] Using this balance as an example, the 80% settlement amount for Andrea Cornachio (before deductions of Applicable Withholding) as of June 30, 2017 would equal $47,322.97.

[8] Again using the June 30, 2017 statement balance as an example, the Trustee would receive $11,830.74 as of that date.

(citing *Protective Comm. for Indep. Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424 (1968)).

49. The Second Circuit has stated that, in determining whether to approve a compromise, the court should not decide the numerous questions of law and fact raised by the compromise; rather it should "canvass the issues and see whether the settlement 'fall[s] below the lowest point in the range of reasonableness.'" *Cosoff v. Rodman (In re W.T. Grant Co.)*, 699 F.2d 599, 608 (2d Cir.), *cert. denied*, *Cosoff v. Rodman*, 464 U.S. 822 (1983) (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir.), *cert. denied*, 409 U.S. 1039 (1972)); *see also In re Chemtura Corp.*, 439 B.R. 561, 594 (Bankr. S.D.N.Y. 2010). "[T]he court need not conduct a 'mini-trial' to determine the merits of the underlying litigation." *In re Purified Down Prods. Corp.*, 150 B.R. 519, 522 (S.D.N.Y. 1993).

50. The factors courts in the Second Circuit consider when approving bankruptcy settlements are well established:

> (1) the balance between the litigation's possibility of success and the settlement's future benefits; (2) the likelihood of complex and protracted litigation, with its attendant expense, inconvenience, and delay, including the difficulty in collecting on the judgment; (3) the paramount interests of the creditors, including each affected class's relative benefits and the degree to which creditors either do not object to or affirmatively support the proposed settlement; (4) whether other parties in interest support the settlement; (5) the competency and experience of counsel supporting, and [t]he experience and knowledge of the bankruptcy court judge reviewing, the settlement; (6) the nature and breadth of releases to be obtained by officers and directors; and (7) the extent to which the settlement is the product of arm's length bargaining.

Fox v. Picard (In re Madoff), 848 F.Supp.2d. 469, 487-488 (S.D.N.Y. 2012), *aff'd*, 740 F.3d 81 (2d. Cir. 2014) (quoting *Motorola, Inc. v. Official Comm. of Unsecured Creditors* (*In re*

Iridium Operating LLC), 478 F.3d 452, 462 (2d Cir. 2007) (internal quotation marks and citations omitted)).

51. Even though the Court has discretion to approve settlements and must independently evaluate the reasonableness of the settlement, *In re Rosenberg*, 419 B.R. 532, 536 (Bankr. E.D.N.Y. 2009), the business judgment of the Trustee and his counsel should be considered in determining whether a settlement is fair and equitable. *In re Chemtura Corp.*, 439 B.R. at 594. Finally, the Court should be mindful of the principle that "the law favors compromise." *Vaughn v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),* 134 B.R 499, 505 (quoting *In re Blair*, 538 F.2d 849, 851 (9th Cir. 1976)).

52. Here, the Trustee's settlements with each of the respective settling parties is fair and equitable and in the best interests of the Debtor's estate and its other creditors.

53. The settlements embodied by the Settlement Stipulations are in the paramount interest of creditors. As a result of the settlements, in addition to the other benefits to the Estate, the Narco Freedom Estate will receive an aggregate amount, anticipated to be in excess of $100,000.[9] Absent the settlements, the Trustee would be required to litigate difficult issues as to bo the the 457(b) Plan and the Vacation Pay Fund and there is no certainty that the Trustee wiould succeed as to either.

54. For example, while there exists clear case law indicating that the assets of a 457(b) plan like the Debtor's Plan are assets of the Estate and do not belong to the plan participants, Section 541 of the Bankruptcy Code contains an express exclusion from the definition of property of the estate for "any amount—(A) withheld by an employer from the wages of employees for payment as contributions—(i) to… (II) a deferred compensation plan under section 457 of the

[9] The exact amount of distribution to the trustee and other parties with respect to funds from the 457(b) Plan will not be determined, as explained in each of the Settlement Stipulations, until the Effective Date (as defined therein).

Internal Revenue Code of 1986." *See* 11 U.S.C. 541(b)(7). As to the Vacation Pay Fund, while the Trustee has arguments that some or all of the employees should be treated as unfaithful servants, there is legal authority in this jurisdiction that setoff against an employee's compensation is impermissible.

55. The claimants' acceptances of lower settlement amounts as compared to the amounts sought in their respective claims increases the amount available for distribution to the Debtor's other creditors.

56. An additional benefit of the Settlement Stipulations is that the Trustee will avoid having to further litigate the 457(b) Plan Adversary Proceeding and the Vacation Pay Fund issue and the potential attendant costs and delays of such litigation.

57. Furthermore, the Settlement Stipulations will expunge claims by four former employees that equal an aggregate amount of $979,560.63. While the Trustee believes those claims may be duplicative, particularly to the extent these are claims to recover vacation pay and /or the 457(b) Plan funds, nevertheless, the Settlement Stipulations will eliminate the need for the Trustee to litigate those issues as to the claims as well.

58. The settlements are the product of arm's length, good faith negotiations between the Trustee and the respective settling parties and their counsel.

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59. For all of these reasons, the settlements are well within the "range of reasonableness," *In re W.T. Grant Co.*, 699 F.2d at 608 (quoting *Newman v. Stein*, 464 F.2d at 693), and confer a substantial benefit on the estate and its general unsecured creditors. The Trustee respectfully requests that the Court approve the Settlement Agreement.

NOTICE

60. In accordance with Bankruptcy Rule 9019, notice of this motion is being given to (a) the United States Attorney for the Southern District of New York; (b) the Attorney General for the State of New York; (c) the Office of the United States Trustee; (d) all parties who filed notices of appearance in the bankruptcy case and/or the 457(b) Plan Adversary Proceeding; (e) PenServ; (f) all creditors listed on the Debtor's schedules or who filed proofs of claim; and (g) known officers, directors, equity interest holders and principals of the Debtor, to the extent that their contact information is known or available. The Trustee submits that no other notice is required.

WHEREFORE, the Trustee respectfully requests the Court approve the proposed Settlement Stipulations attached as Exhibits A through C, so order the Settlement Stipulations, and grant such other and further relief as is just.

Dated: New York, New York
September 27, 2017

Respectfully submitted,

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